85-775

Supreme Court, U.S.
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(E000608)

IN THE SUPREME COURT OF THE

UNITED STATES

October Term - 1985

No. _____

STEVEN MASTROPAOLO, Petitioner

vs.

HENRIETTE JULIENNE MASTROPAOLO
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

On Appeal From the Supreme Court of California

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QUESTION PRESENTED

Whether the disability retirement benefits of a member of the United States armed services who was retired pursuant to 10 U.S.C. 1210 and 1201 with one hundred (100%) percent disability may be treated as community property of the marriage by the States, and, thus, made subject to division and distribution between spouses during proceedings in State courts for dissolution of marriage.

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To The Honorable Chief Justice and
Associate Justices of the
Supreme Court of the United States

STEVEN MASTROPAOLO, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on July 11, 1985. On that date the

California Supreme Court denied Petitioner's Petition for Review of the April 15, 1985, Decision of the Court of Appeals of California, Fourth Appellant District, Division Two.

OPINIONS BELOW

The opinion of the Court of Appeals of California, Fourth Appellant District, Division Two, is reported at 166 Cal. App.3d 953 (213 Cal. Rptr. 26) and is printed in Appendix A hereto, Page 18. The Judgment of the California Supreme Court is printed in Appendix A hereto, infra, Page 18. The Judgment of the Supreme Court of California, In and for the County of San Bernardino, is printed in Appendix F hereto, infra, Page 42.

JURISDICTION

The Judgment of the Fourth District Court of Appeals of the State of California, Division Two, was entered on April 15, 1985. (Appendix A, infra, Page 18). A timely Petition for Review to the California Supreme Court was denied on July 11, 1985. (Appendix B, infra, Page 39). The jurisdiction of the Supreme Court is involved under Title 28 of the United States Code, Section 1254 (1), Rule 17(c), in that the courts of the State of California have decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court, in that the settlement of the questions involved herein reach constitutional dimensions.

QUESTIONS PRESENTED

Whether the disability retirement benefits of a member of the United States armed services who was retired pursuant to 10 U.S.C. 1210 and 1201 with one hundred (100%) percent disability may be treated as community property of the marriage by the States, and, thus, made subject to division and distribution between spouses during proceedings in State courts for dissolution of marriage.

STATUTE INVOLVED

This case involves 10 U.S.C. 1408 (c) (1) as follows:

> "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or

as property of the member and his spouse in accordance with the law of the jurisdiction of such court".

10 U.S.C., Section 1408 (a)(4), provides:

"'Disposable retired or retainer pay' means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under Chapter 61 of this title . . .".

STATEMENT OF CASE

Petitioner entered the United States Army Air Force on active duty in March, 1951. In October, 1953, he married HENRIETTE MASTROPAOLO, Respondent herein, while on active duty in France. In April 1971, Petitioner was placed on the temporary disability retired list in grade of Major pursuant to 10 U.S.C. 1202. On December 4, 1972, Petitioner

was removed from the temporary disability list in the grade of Major, pursuant to 10 U.S.C. 1210 and 1201.

Petitioner and his former Spouse, HENRIETTE MASTROPAOLO, separated in September, 1972, and in February, 1983, a trial was had in the Superior Court of the State of California, County of San Bernardino, for a dissolution of the marriage, characterization and distribution of the community property.

Petitioner testified during trial and presented documents in evidence that he was one hundred (100%) percent disabled and had been retired pursuant to 10 U.S.C. 1210 and 1201. (Clerk's Transcript, Page 229; Exhibit 10 in Evidence). Copies of his retirement orders are attached hereto, infra, and marked Appendixes "C", "D", and "E", Pages 40, 41, and 42, respectively.

The trial court treated the disability retirement benefits as community property and ordered Petitioner to pay his former Spouse 43.65 percent of all his disability retirement benefits paid in the future, as well as 43.65 percent of the benefits Petitioner had previously received, a sum totalling over $48,694.00.

In July, 1984, Petitioner appealed the trial court's decision specifically stating in his Opening Brief that the trial court's decision was erroneous in that "Federal law precludes the state courts from dividing disability pay and this decision is in conflict with the provisions of Title 10 of the United States Code . . .". (Petitioner's Opening Brief, Page 7).

In April, 1985, this Fourth District Court of Appeals for California issued its Opinion (which is printed in Appendix A, infra, Page 18), which affirmed the trial court's decision.

In May, 1985, Petitioner filed a petition for Review with the Supreme Court of California in which he once again argued that the Supremacy Clause and the express language of the Federal statute had deprived the State courts of jurisdiction to determine the individual or community character of disability retirement pay in family law proceedings.

The Petition for Review was denied by the California Supreme Court on July 11, 1985, without comment.

REASONS FOR GRANTING WRIT

The State courts of California have decided that Federal law does not

prohibit the treatment of military disability benefits as community property.

Such a decision is: 1) contrary to the express language of the Uniformed Services Former Spouses Protection Act (10 U.S.C. 1408), and 2) is contrary to the decisions as expressed in such cases as McCarty vs. McCarty, (1981) 453 U.S. 210, 69 L.ED.2d 589, 101 S. Ct. 2718; Ridgway vs. Ridgway, (1981) 454 U.S. 46, 53-55 (70 L.ED.2d 39, 46-48, 102 S.Ct. 49, 54-55); and Hisquierdo vs. Hisquierdo, (1979) 439 U.S. 572, (59 L./ed.2d 1, 99 S. Ct. 802).

This Court, in McCarty vs. McCarty, supra, stated that it is clear that Federal statutes on this issue pre-empt the State's right to characterize retirement benefits as community property.

In response to McCarty, the Congress passed Public Law No. 97-252 (10 U.S.C. 1408).

10 U.S.C. 1408 provides at Subdivision (c)(1):

> "Subject to the limitations of the section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the jurisdiction of such court."

The key words in that Section are "Subject to the limitations of this section" and "disposable retired or retainer pay . . .".

Congress granted to the States a limited right to divide disposable retired pay.

"Disposable retired or retainer pay" is defined by Section (9)(4) of 10 U.S.C. 1408 as the total monthly retired or retainer pay to which a member is entitled other than the retired pay of a member retired for disability under Chapter 61 of 10 U.S.C. The Court will note that Petitioner was retired from active duly pursuant to 10 U.S.C. 1210 and 1201 with one hundred (100%) percent disability.

The State Court hinged most of its reasoning on the presumed fact that Petitioner somehow "elected" disability retirement instead of longevity retirement, or that such an election constructively resulted from his ability to have received either longevity or retirement benefits.

Petitioner has affixed to this Petition as Appendix "C", a copy of Department of Defense Form 214, which shows that Petitioner was retired effective April 16, 1971, and his date of entry was October 24, 1952. Clearly, Petitioner did not serve twenty (20) years and was not eligible for longevity retirement. Also attached hereto as Appendixes "D" and "E" are Petitioner's Retirement Orders dated April 1, 1971, and December 4, 1972, respectively. These documents show that Petitioner was just placed on the temporary disability list and relieved from active duty pursuant to 10 U.S.C. 1202; and, then, in December, 1972, permanently retired pursuant to 10 U.S.C. 1210 and 1201, with one hundred (100%) percent disability.

It is clear from the language of 10 U.S.C. 1408 that compensation paid for Chapter 61, 10 U.S.C. 1210 and 1201, disabilities are specifically not permitted to be treated as community property by the States.

Congress has drafted and enacted the Uniform Services Former Spouses' Protection Act so that disabled Veterans are allowed to retain all of the benefits attributable to their disabilities. Had Congress not intended to limit the right of the States to treat disability benefits as community property, it would not have specifically excluded such benefits from the protection of the Act.

This case should be reviewed by this Court because it deals with a conflict between Federal and State rules

for the allocation of a Federal entitlement. The Decision by the California courts that military disability benefits are divisable as community property does "major damage" to a "clear and substantial" Federal interest, such that the Supremacy Clause demands that state law be overridden on this matter. Notwithstanding the limited application of Federal law in the field of domestic relations, (Hisquierdo, supra 99 S.Ct. 802), generally, a state divorce decree, like any other law governing the economic aspects of domestic relations, must give way to clearly conflicting Federal enactments. That principle is the necessary consequence of the Supremacy Clause. (U.S.C.A. Constitution, Article 6, Clause 2).

Ridgway vs. Ridgway, supra, 102 S.Ct. 49, at Pages 54-55.

In a situation wherein the language of a valid Federal statute is straight forward and specifically excludes certain disability pay from being treated as community property by the States, then the States are forbidden from denying to the retired serviceman his personal entitlement to such benefits. [S. Rep. No. 1480, 90th Congress, Second Session 6 (1968)]. Congress has spoken with "force and clarity" on this issue. There is no dispute that Congress enacted 10 U.S.C. 1408 in response to this Court's decision in McCarty vs. McCarty, supra. At that time, they allowed the States to treat longevity retirement pay in accordance with the laws of the State,

but specifically denied to the States the power to so treat disability retirement pay. It is clear that Congress intended that military disability pay "actually reach the beneficiary".

As is explained by this Court in McCarty, supra, the application of community property principles to military disability retired pay threatens grave harm to "clear and substantial" Federal interests. "Congress has enacted a military retirement system designed to accomplish two major goals: to provide for the [disabled] service member, and to meet the personnel management needs of the active military forces." "The community property division of [disability] pay has the potential to frustrate each of these objectives." McCarty vs. McCarty, 453 U.S. 233.

CONCLUSION

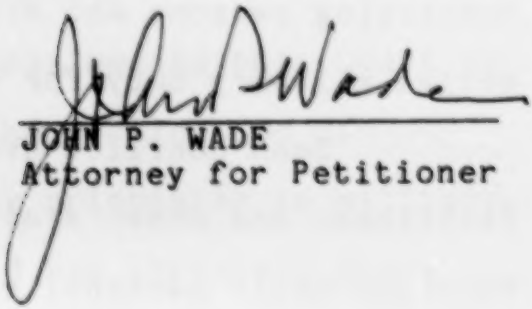
The decisions of the California Courts are in direct conflict with the express language of 10 U.S.C. 1408 concerning persons who are retired from active military duty for disabilities.

Such conflict denies to Petitioner and other similarly situated Veterans their personal entitlement to disability retirement benefits. Such a decision by the California Courts threatens grave harm to the substantial Federal interest in maintaining proper incentives and rewards for the service of military personnel, especially those disabled as a result of that service.

"Congress has weighed the matter and it is not the province of the State Courts to strike a balance different from the one Congress has struck." McCarty

vs. McCarty, 453 U.S. 208, at Page 236, quoting Hisquierdo.

Respectfully submitted,



JOHN P. WADE
Attorney for Petitioner

PROOF OF SERVICE BY MAIL

I, CAROL L. WORTHINGTON, declare:

I am employed in the County of San Bernardino, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 370 West Sixth Street, Suite 100, San Bernardino, California 92401.

On September 30, 1985, I served the foregoing Petition for Writ of Certiorari on the following parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Bernardino, California:

PROOF OF SERVICE BY MAIL (Continued)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 30 day of September, 1985.

CAROL L. WORTHINGTON

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

STATE OF CALIFORNIA

In re the Marriage of HENRIETTE JULIENE MASTROPAOLO and STEVEN MASTROPAOLO.	)	
HENRIETTE JULIENNE MASTROPAOLO, Petitioner and Respondent,	)	4 Civil 33142 [E000608]
and STEVEN MASTROPAOLO, Appellant.	)	(Super.Ct.No. FL 2854)
	)	O P I N I O N

APPEAL from a judgment of the Superior Court of San Bernardino County, Duke D. Rouse, Judge, Affirmed in part; conditionally reversed in part with directions.

John P. Wade for Appellant.

Chase, Rotchford, Durkker & Bogust, Mark C. Schnitzer and Pamela K. Harer for Petitioner and Respondent.

Steven Mastropaolo (husband) appeals form a judgment on reserved issues, attacking awards to his former spouse, Henriette Julienne Mastropaolo (wife), of a 43.65 percent community property interest in that part of his military disability retirement pension that would have been paid to him as longevity retirement benefits had he so elected and $700 per month in spousal support. Husband contends the award to his former wife of a community interest in his military disability retirement pension is contrary to law and the award of $700 per month spousal support constitutes an abuse of discretion.

Background Facts

The parties were married on October 21, 1953, and separated on September 26, 1972, after more than 19 years of marriage. There is one child of the marriage but the child has reached majority. Husband entered the United States Air Force on March 9, 1951. He retired from the Air Force on December 22, 1972, as 100 percent disabled pursuant to chapter 61, title 10, U.S.C. 1210 and 1201. At the time of nis retirement husband had served more than 20 years, was eligible for longevity retirement and could have elected to receive longevity retirement benefits rather than disability retirement benefits. However, the monthly payments under disability retirement exceeded those under longevity retirement by approximately $200 per month, so, of

course, husband did not elect longevity retirement.

The issue of marital status and the property and support issues were bifurcated and on about December 15, 1981, an interlocutory judgment was entered dissolving the marriage. Trial on the reserved issues ensued in February 1983.

The parties stipulated that had husband elected to receive longevity retirement benefits the amount of the monthly payment he would have been receiving at the time of trial was $1549.71. It was further stipulated that since the separation of the parties husband had received $117,825.56 that would have been paid as longevity retirement benefits attributable to the period of the marriage had husband so

elected, and further, that husband had not paid any part of that over to wife.

The trial court determined that portion of the retirement benefits husband could have received as longevity retirement pay was community property except for the part attributable to the period before marriage. Accordingly, the court awarded to wife as her community property share of the retirement benefits a 43.65 percent interest in that part of each future monthly payment that would have been received under a longevity retirement had husband so elected (43.65 percent of $1,549.71 or $676.45 per month at the time of trial). To equalize the division of the community property, including the $117,825.56 in pension benefits received by husband after separation, husband was ordered to pay to wife the sum of $77,590.28. In addition,

the court determined husband had improperly disposed of wife's separately owned personal property valued at $26,000 and husband was ordered either to return that property to wife or to pay her its value.

Husband was awarded as his sole and separate property 56.35 percent of what would have been the longevity retirement benefits, all of the retirement benefits attributable to service before marriage and all of the retirement benefits attributable to husband's disability, that is, all retirement benefits over and above what would have been the longevity retirement benefits.

Other facts relevant to a particular issue will be set forth in connection with the discussion of that issue.

Military Retirement Benefits

Preliminarily, husband asserts that inasmuch as his is 100 percent disabled for purposes of military service, his military disability retirement is compensation for personal pain and suffering and constitutes separate property. (Cf. In re Marriage of Jones (1975) 13 Cal.3d 457, 464; disapproved on other grounds in In re Marriage of Brown (1976) 15 Cal.3d 838, 851, fn. 14.) Not so.

As husband concedes, the amount of his disability retirement pension depended on the length of his service and the rank he attained. As explained by the California Supreme Court in In re Marriage of Stenquist (Stenquist I) (1978) 21 Cal.3d 779, 786-787: "`[O]nly a portion of husband's pension benefit payments, though termed "disability

payments," is properly allocable to disability. It would be unjust to deprive wife of a valuable property right simply because a misleading label has been affixed to husband's pension fund benefits.' (In re Marriage of Cavnar (1976) 62 Cal.App.3d 660, 665 [133 Cal.Rptr. 267]; see Pattiz, In a Divorce or Dissolution Who Gets the Pension Rights: Domestic Relations Law and Retirement Plans (1978) 5 Pepperdine L.Rev. 191, 198 and cases there cited.) [Fn. omitted.] [Paragraph Symbol] The purpose of disability benefits, as we explained in Jones, is primarily to compensate the disabled veteran for `the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the job market' (13 Cal.3d at p. 459) and secondarily to compensate him for the

personal suffering caused by the disability. Military retired pay based on disability, however, does not serve those purposes exclusively. Because it replaces a `retirement' pension, and is computed in part on the basis of longevity of service and rank at retirement, it also serves the objective of providing support for the serviceman and his spouse after he leaves the service. Moreover, as the veteran approaches normal retirement age, this latter purpose may become the predominate function served by the `disability' pension."

The case at bench would clearly be governed by the California Supreme Court's decision in Stenquist I and the decision of this court in In re Marriage of Mueller (1977) 70 Cal.App.3d 66. In both those decision it was held that

although generally speaking disability retirement pensions are the separate property of the employee spouse, when the employee spouse was also eligible to receive regular longevity retirement benefits at the time he or she retired for disability, "[i]t would be inconsistent with community property principles `to permit [the employee] spouse to transmute what would otherwise be community property into his or her separate property.' [Citation omitted.]" (In re Marriage of Stenquist, supra, 21 Cal.3d 779, 786, fn. omitted; In re Marriage of Mueller, supra, 70 Cal.App.3d 66, 71-72.)

Husband contends, however, these decisions are no longer good law because federal law governs the characterization and disposition of military retirement benefits and forbids the characterization

and disposition of military disability retirement pensions as community property. Whatever may be the required result with respect to military disability retirement pension otherwise, we conclude that federal law does not prohibit the disposition ordered by the trial court in the circumstances of this case: where the military spouse retired before dissolution of the marriage and at the time he retired was eligible both for longevity and disability retirement and could have elected to receive longevity retirement benefits. In these circumstances the nonmilitary spouse had an interest in the retirement benefits recognized under both federal and state law which the military spouse could not destroy by his election to receive

disability retirement benefits.[3]/

Husband first contends Stenquist I and Mueller were in effect overruled by the decision in McCarty v. McCarty (1981) 453 U.S. 210 [69 L.Ed.2d 589, 101 S.Ct. 2728]. In that case the United States Supreme Court held the military longevity retirement pensions were subject to exclusive federal control and state courts were precluded from dividing them in accordance with state laws on dissolution of marriage. The McCarty court suggested that providing additional protection for former spouses of service

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3/ Several times in the opinion we shall refer to these circumstances. They are circumstances that exist in this case and necessarily limit our holding. However, by referring to the circumstance that, here, the retirement occurred before dissolution of the marriage we do not mean to suggest that the absence of the circumstance would make a decisive difference.

persons was more appropriately left to Congress than the judiciary.

It must be admitted that the McCarty decision was inconsistent in principle with the Stenquist I and Mueller decisions. However, technically McCarty did not involve and was not addressed to disability retirement pensions but rather longevity pensions.

More importantly, within months after the McCarty decision and presumably in response to the court's invitation in McCarty, Congress enacted the Federal Uniform Services Former Spouse's Protection Act (FUSFSPA) (Pub. L. No. 97-252, 10 U.S.C. Section 1408). In section 1408(c)(1) FUSFSPA provides: "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after

June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of [the] court." (Emphasis added.) The manifest purpose of FUSFSPA was to nullify the McCarty decision. (See Aloy v. Mash (1985) ___ Cal.3d ___, ___*, fn. 7; In re Marriage of Buikema (1983) 139 Cal.App.3d 689, 691; see also In re Marriage of Cullen (1983) 145 Cal.App.3d 424, 427.) So we do not believe McCarty may fairly be said to have invalidated Stenquist I and Mueller.

Next, husband asserts that by expressly excluding payments due under military disability retirement pensions

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*California Supreme Court, Civ. S.F. 24639, filed March 28, 1985, slip opn. at p. 15.

for the definition of "disposable retired or retainer" pay which may be disposed of "in accordance with the law of the jurisdiction of [the] court," FUSFSPA signifies a congressional intention to preempt state law and disallow disposition of military disability retirement pay by state courts in accordance with state law. The question is not an easy one.

FUSFSPA at section 1408(a)(4) defines disposable retired or retainer pay as meaning "the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which [Paragraph Symbol] . . . (B) are required by law to be and are deducted from the retired or retainer pay of such member, including . . . amounts waived in

order to receive compensation under title 5 or title 38; . . ." (Emphasis added.) The argument is that the italicized language indicates that disability retirement pay is not to be disposed of by the court upon dissolution of marriage "in accordance with the law of the jurisdiction of such court" as is provided in respect to regular longevity retirement pay in section 1408(c)(1) quoted earlier.

We are not the first to confront this problem. The First Division of this court recently rejected the very contention made by husband in deciding the companion cases of In re Marriage of Cullen, supra, 145 Cal.App.3d 424 and In re Marriage of Stenquist) (Stenquist II) (1983) 145 Cal.App.3d 430. In Cullen the court explained: "[I]n defining `disposable retired or retainer pay,'

Congress specifically excluded `the retired pay of a member retired for disability under chapter 61 of this title.' (Tit. 10 U.S.C. Section 1408(a)(4).) Thus, it is argued, Congress has not accorded the states power to apply state community property laws to military disability pay as was done in Stenquist I. it is further argued, any attempt by the California Legislature or judicial authorities to exercise power over the husband's disability pay and to whom it may be given is void as an unconstitutional infringement upon the powers of Congress protected by the supremacy clause of the United States Constitution, article VI, clause 2. Under the supremacy clause, the rights and expectancies established by federal law are protected against the operation of state law which might

otherwise frustrate and erode federal congressional policy. (See Ridgway v. Ridgway (1981) 454 U.S. 46, 53-55 [70 L.Ed.2d 39, 46-48, 102 S.Ct. 49, 54-55].)

"This argument relies upon the Act's failure to address whether disability retirement pay may or may not be treated by state courts as property of the member and his or her spouse. This omission is read to prohibit the State of California from treating disability retirement pay as community property. Nothing in the Act nor in case law warrants a conclusion that Congress merely by failing to include disability pay in the definition of `disposable retired or retainer pay' intended to deprive the state courts of jurisdiction to determine the individual or community character of disability retirement pay in family law proceedings. The correct standard for review under the

supremacy clause was stated by the United States Supreme Court recently in Hisquierdo v. Hisquierdo (1979) 439 U.S. 572, at page 581 [59 L.Ed.2d 1, at page 11, 99 S.Ct. 802]: "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. {Citation.]' Hisquierdo also said: `[S]tate interests "should be overriden (sic) by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied."' (Id., at p. 595[59 L.Ed.2d at p. 19], [orig. emphasis.]

It should be further noted that California law generally treats disability retirement pay as separate property of the Armed Forces. (In re Marriage of Jones [1975] 13 Cal.3d 457.) However, here, as in Steinquist I, the judgment awards only a portion of the husband's disability retirement pay to his former spouse because he was eligible to receive either disability or nondisability retirement pay. After having received nondisability retirement pay, the husband then waive it and elected to receive the disability pension of a higher amount. The trial court here, as in Stenquist I, treated the excess due to the disability retirement as additional compensation attributable to the husband's disability. There is no positive indication of congressional intent to preempt the basic state policy

preventing a marital partner from depriving the other spouse of a vested community property right by a unilateral decision based upon the well-recognized rule that disability payments are the separate property of the spouse. The compromise and rule adopted by our Supreme Court in Stenquist I appears to give full recognition to the character of the disability payment, but at the same time recognizes the basic right of a spouse not to be deprived of a community asset by the voluntary act of another." (In re Marriage of Cullen, supra, 145 Cal.App.3d at pp.428-429; accord In re Marriage of Stenquist, supra, 145 Cal.App.3d 430, 433-435.)

The reasoning of the court in Cullen and the dicta to the same effect in Stenquist II were criticized in In re Marriage of Costo (1984) 156 Cal.App.3d

781, 787-788, including footnote 11.[4]/ Costo, however, was a case in which the military spouse was granted disability benefits under title 38 of the United States Code and was required to waive a like portion of his longevity retirement pay to receive those benefits. The portion of FUSFSPA previously quoted expressly provides that amounts waived in

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[4]/ Footnote 11 of the Costo decision reads in pertinent part: "Even though the instant case may be distinguished from In re Marriage of Cullen, supra, 145 Cal.App.3d 424 and In re Marriage of Stenquist (Stenquist II), supra, 145 Cal.App.3d 430, which involved disability payments under chapter 61 of title 10 . . ., we question the reasoning of those decisions. . . . [Paragraph Symbol] As we read section 1408(a)(4) of title 10 . . . disability retirement pay under chapter 61 is specifically excluded, thereby depriving state courts of jurisdiction, by the following language: `other than the retired pay of a member retired for disability under chapter 61 of this title.' The Fourth district seems to be setting up a straw man,

order to receive compensation under title 38 are excluded from division by the court upon dissolution of marriage. (Tit. 10, U.S.C. Section 1408(a)(4).) As the Costo court recognized, therefore, its criticism of Cullen and Stenquist II was dicta.

We cannot say the Costo court's conclusion is totally illogical. Given the McCarty decision, FUSFSPA's express exclusion of disability retirement pay from the effects of the act can hardly be regarded as insignificant. However, in view of the general reluctance of both federal and state courts to imply a

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4/ (Continued)
namely, the fact that the act fails to include disability pay in the definition of 'disposable retired or retainer pay,' to defeat federal preemption. In our opinion, the argument for federal Costro, supra, 156 Cal.App.3d 781, 787, fn. 11, orig. emphasis.)

federal preemption of state law unless it is clearly required, we are inclined to agree with Cullen and Stenquist II.

In Hisquierdo vs. Hisquierdo (1979) 439 U.S. 572, 581 [59 L.Ed.2d 1, 11, 99 S.Ct. 802] the United States Supreme Court stated that preemption will be found only where it is determined that "Congress has `positively required by direct enactment' that state law be preempted." The express exclusion of disability retirement pay from FUSFSPA's coverage would appear to be a manifestation of Congress' failure to act rather than a "`direct enactment' that state law be preempted." Moreover, as observed in Stenquist II, "in order to find congressional preemption of a state rule or statute, it is essential to find Congress actually considered and reached some decision concerning the issue

involved. (See United States v. Bass (1971) 404 U.S. 336, 349, 350 [30 L.Ed.2d 488, 497, 498, 92 S.Ct. 515.])" (In re Marriage of Stenquist, supra, 145 Cal.App.3d 430, 434.)

However, even if we were to conclude that the Costo court's dicta is correct, that would not resolve this case. In the circumstances of this case, namely where the retirement occurred before the dissolution of the marriage (see fn. 3, ante) and at a time when the military spouse was eligible for both longevity and disability retirement and could have elected to receive longevity retirement benefits, under both federal law (tit. 10, U.S.C. Section 1408(c)(1) and California law (In re Marriage of Gillmore (181) 29 Cal.3d 418, 422, including fn. 2; In re Marriage of Fithian (1974) 10 Cal.3d 592, 596

[overruled insofar as it indicated only vested rights were subject to division by In re Marriage of Brown 91976) a5 Cal.3d 838, 851 fn. 14]) wife would have been entitled to a community property share of the longevity retirement pension for which husband was eligible had he elected to receive longevity retirement benefits. Under California law, in accordance with which the division of longevity retirement benefits would have been made under FUSFSPA, wife's rights were vested. (E.g., In re Marriage of Gillmore, supra.) The question is, then, whether preemptive federal law permits a military spouse in the situation of husband to destroy the other spouse's federal statutory right and concomitant state law right by simply accepting a disability retirement and opting not to

elect a longevity retirement. We believe not.

In a somewhat analogous situation, although it did not involve the question of federal preemption, this court recently relied on the resulting trust doctrine to effectuate, in effect, a division of state employee death benefits between a former spouse and a surviving spouse even though the benefits were statutorily payable only to the surviving spouse. (In re Marriage of Becker (1984) 161 Cal.App.3d 65, 74-75.) Our decision in Becker was based on the same principle of law as underlay Stenquist I and Mueller, that one spouse may not be permitted by exercise of a power wholly within that spouse's control to transmute what would otherwise be the community property of both spouses into his or her separate property. (In re Marriage of

Stenquist, supra, 21 Cal.3d 779, 786; In re Marriage of Mueller, supra, 29 Cal.3d 418, 423, and cases there cited.)

As we explained in Becker: "It is true that in this case the surviving spouse is to receive a monthly allowance rather than repayment of the accumulated contributions to the retirement system. However, as we shall explain, she was entitled to receive the accumulated retirement contributions if she so elected, and the fact that she is to receive a monthly allowance rather than the accumulated contributions is a product of her own choice. In essence, the surviving spouse has traded her right to receive the accumulated retirement contributions, out of which former wife would have been entitled to reimbursement of her community share under Chirmside [Chirmside v. Board of Administration

(1983) 143 Cal.App.3d 205], for a monthly allowance. (Emphasis added.)

"While the surviving spouse was statutorily entitled to make the choice she did and committed no wrong in so doing, she has effectively utilized former wife's right to reimbursement to acquire, in part, her monthly allowance. The situation presented is a classic one for the imposition of a resulting trust. When one person furnishes the money or other thing of value with which property is acquired and title to the property is taken in the name of another, absent the intention of the one to confer a gift upon the other, the titleholder is a trustee upon a resulting trust of the property for the benefit of the person who furnished the money or other thing of value by which the property was acquired. (Civ. Code, Section 853; Keene

v. Keene (1962) 57 Cal.2d 657, 665 [21 Cal.Rptr. 593, 371 P.2d 329]; Viner v. Untrecht (1945) 26 Cal.2d 261, 269 [158 P.2d 3]; Martin v. Kehl (1983) 145 Cal.App.3d 228, 238-239 [193 Cal.Rptr. 312]; see Rest.2d Trusts, Sections 440, 455; 7 Witkin, Summary of Cal. Law (8th ed. 1974) Sections 126-128, pp. 5484-5486.) Where only a portion of the acquisition price has been furnished, a resulting trust may be established in a fractional interest in the property on a pro tanto basis. (Keene v. Keene, supra, 57 Cal.2d 657, 665; Watson v. Poore (1941) 18 Cal.2d 302, 317 [115 P.2d 478]; Juranek v. Juranek (1938) 29 Cal.App.2d 276, 281 [84 P.2d 195]; see Rest.2d Trusts, Section 454.)" (In re Marriage of Becker, supra, 161 Cal.App.3d 65, 74-75, fn. omitted, emphasis added.)

The same logic should apply here. So far as we are aware the federal courts recognize the resulting trust doctrine in appropriate circumstances, and we are confident they would find it appropriate here to further the congressional intent to protect spouses of service personnel that is manifest in FUSFSPA.

We conclude that the order awarding wife her share of the community property interest in the military retirement benefits is not contrary to law.

Disposition

Insofar as the judgment awards wife a community property interest in the military retirement pension of husband it is affirmed. Upon condition that the foregoing judgment of affirmance becomes final, that part of the judgment awarding wife $700 per month spousal support is

reversed for further proceedings consistent with this opinion. If for any cause the foregoing affirmance should not become final, that part of the trial court judgment awarding wife $700 per month spousal support is affirmed. If pursuant to this appellate judgment the portion of the judgment awarding wife $700 per month spousal support stands reversed and it appears husband has paid spousal support is excess of the amount eventually set, the trial court is directed to credit any such excess amount against the equalizing payment of $77,590.28 specified in the judgment.

CERTIFIED FOR PUBLICATION.

KAUFMAN
Acting P.J.

We concur:

MCDANIEL
J.

RICKLES
J.

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Attorney for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

In re the Marriage of HENRIETTE JULIENNE MASTROPAOLO Petitioner and STEVEN MASTROPAOLO by and through his guardian ad litem Paul Mastropaolo, Respondent	CASE NO. FL 2854 JUDGMENT ON RESERVED ISSUES

The above entitled matter came on regularly for Court trial on February 16, 1983 in Department 8 of the

above-entitled Court, the Honorable Duke D. Rouse Superior Court Judge presiding. Petitioner appeared by and through her attorneys Mark C. Schnitzer, a Member of Mark C. Schnitzer, A Law Corportion and Chase, Rotchford, Drukker & Bogust, by Pamela K. Harer; respondent and his guardian ad litem Paul Mastropaolo appeared through their attorney Max E. Henry and evidence both oral and documentary having been submitted and considered, the Court made the following findings:

1. That the parties were married on October 21, 1952, and that they separated on September 26, 1972.

2. That the period of time from the date of marriage to date of separation is 19 years and 11 months.

3. That the Petitioner had been a continuous resident of this state for at

least six month (sic) and of this county for at least three months immediately preceding the filing of the Petition on October 16, 1970.

4. That the Court acquired jurisdiction in the matter on December 16, 1970, by reason of service.

5. That irreconcilable differences have unfortunately arisen between the parties which have caused an irremediable breakdown of this marriage, and that there appears to be no possibility of reconciliation of the parties.

6. That there are no minor children of this marriage.

7. That the parties made the following oral stipulation in open court:

(a) That the current fair market value of the Baccarat crystal is $61.68 per piece.

(b) That Respondent has received since separation $117,825.56 (87.3% of Military Retirement Benefits received), which was community property.

(c) That Respondent's longevity retirement benefits were $1,549.71 per month as of February 16, 1983.

8. That the community property of the parties and the valuation thereof is as follows:

(a) 1969 MG Princess automobile	$ 2,000.00
(b) Household furniture and furnishings	4,000.00
(c) Antiques, objects of art, and items of special value	20,000.00
(d) Library of several thousand books	$ 5,000.00

(e) Cosmetic manufacturing equipment and laboratory equipment	3,500.00
(f) Machine shop and tools	600.00
(g) Artist supplies and equipment	200.00
(h) Jacuzzi	300.00
(i) Sewing machine	300.00
(j) Two suitcases	30.00
(k) Guitar	15.00
(l) Adding machine	75.00
(m) Vapozone machine (broken)	125.00
(n) Cosmetic supplies	200.00
(o) Bronze tray from Africa	500.00
(p) 1964 Thunderbird automobile	3,000.00

(q) Military Retirement Benefits - from date of separation to February 1, 1983. (87.3%) $117,825.56

(r) Future Military Retirement Benefits of $1,549.71 per month representing the longevity portion of respondent's Military Retirement benefits as of February 16, 1983, subject to increase according to applicable Federal Law.

9. That the following items are the separate property of Petitioner:

(a) One 17th Century Turkish table - octagonal with inlaid ivory and wood.

(b) One 17th Century Rineland sterling silver tea service, platter.

(c) Six sterling silver dishes - 17th and 19th Century.

(d) One 18th Century sterling silver flatware service for 12.

(e) One watercolor painting by Wateau.

(f) One Roman Amphora, cira 500 B.C.

(g) One bronze statue by Ertza von Lambrech.

(h) Two hand-embroidered linen tablecloths, each with 12 napkins.

(i) Limoqes "Classic Blue" porcelain dinnerware, service for 8.

(j) Books, including an extensive medical library, a first edition of Tennyson, an autographed first edition of The Little Prince by Saint Exupery, a

17th Century first edition in French of the Talmud, and many out-of-print books.

The value of items 9 [a through j] is $26,000.00.

10. That the following items are the separate property of Respondent:

(a) All of his retirement apportioned to his disability.

(b) 56.35% of his longevity retirement benefits.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Respondent is ordered to pay to the Petitioner for her support the sum of $700.00 per month for spousal support, payable one-half on the first and one-half on the 15th days of each month, commencing March 1, 1983 and continuing until the death of either party, remarriage of Petitioner, or until further order of Court.

2. The community property of the parties shall be divided as follows:

(a) To the Petitioner as her sole and separate property: Items (i) through and including (o) and 43.65% of (r) as set forth in paragraph 8 above of the findings.

(b) To the Respondent as his sole and separate property: Items (a) through (h) and item (p) in paragraph 8 of the findings.

3. To equalize the division of the community property, Respondent shall pay to Petitioner the sum of $77,590.28.

4. Respondent shall deliver to Petitioner forthwith the items set forth in paragraph 9 (a through j) as set forth in the findings foregoing, or in the alternative, Petitioner shall have judgment against Respondent for the sum of $26,000.00.

5. Respondent shall pay to Petitioner's attorneys, as his contribution toward Petitioner's attorneys fee, the sum of $3,500.00

APPROVED AS CONFORMING TO THE COURT'S AMENDED MEMORANDUM OF INTENDED DECISION ON RESERVED ISSUES.

BY: /s/ MAX E. HENRY
MAX E. HENRY
Attorney for Respondent and his Guardian ad Litem, Paul Mastropaolo

Dated: 8-8-83

/s/ DUKE D. ROUSE
DUKE D. ROUSE
Judge of the Superior Court